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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

UNITED STATES OF AMERICA, et al.,  
Plaintiffs,

v.

MONTROSE CHEMICAL  
CORPORATION OF CALIFORNIA,  
et al.,

Defendants.

CASE NO. 2:90-cv-03122 DOC (GJS)

**JOINT STATUS REPORT AS TO  
ROLE OF SPECIAL MASTER**

Judge: Hon. David O. Carter

Date: June 10, 2020  
Time: 8:30 a.m.

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**I. BACKGROUND**

On February 24, 2020, the Court appointed the Hon. James L. Smith (Ret.) to serve as a Special Master in this matter. (Docket Entry 2937.) On March 13, 2020, the parties submitted a Joint Status Report in which they identified a disagreement as to the appropriate scope of the Special Master's role in this action. (Docket Entry 2962, at 3-6.) On May 21, 2020, the Court ordered the parties to meet and confer again to resolve any disagreement as to the Special Master's role and to inform the Court whether or not an agreement is reached on or before June 3, 2020. (Docket Entry 2979.) On May 29, 2020, counsel for the parties met and conferred on the scope of Special Master Smith's role and did not reach agreement.

**II. THE PARTIES' RESPECTIVE POSITIONS ON THE ROLE OF SPECIAL MASTER SMITH**

The parties agree that the Special Master should not hold trial pursuant to Fed. R. Civ. P. 53(a)(1)(B). The parties' respective positions on the role of Special Master Smith are otherwise set out below.

**A. Plaintiffs' Position**

As an initial matter, Plaintiffs report that the parties have reached an agreement in principle regarding Defendants' performance of remedial action at the groundwater operable unit and payment of related response costs, and a proposed consent decree memorializing those terms is circulating for signature among Defendants and for review and approval by management at the government agencies. The proposed consent decree also resolves the two disputes concerning pCBSA that are currently in dispute resolution under the Partial Construction Consent Decree, entered in this case on August 22, 2012 (ECF No. 2735).

As to the issue of the Special Master, given the posture of this case and recent settlement developments, Plaintiffs respectfully submit that a Special Master is not necessary in this case. There are only two issues before the Court, one of which (the status of Chris-Craft Industries, Inc. as an operator of the Montrose

DDT Plant under CERCLA) has already been tried, briefed, and submitted; the other is a straightforward CERCLA claim for costs incurred or to be incurred at the Historic Stormwater Pathway. This case is now at a markedly different point in the litigation than it was when Judge Real appointed a Special Master. Should the Court disagree with Plaintiffs and believe a Special Master necessary, Plaintiffs, in the alternative, submit that Special Master Smith act as settlement master to resolve the outstanding issue in this case over the Defendants' liability for costs incurred or to be incurred at the Historic Stormwater Pathway in responding to the release or threatened release of hazardous substances from the Montrose DDT Plant. Plaintiffs note, however, that recent settlement developments demonstrate that the Parties can achieve settlement on their own without incurring the substantial expense of a Special Master. Finally, if the Court decides a Special Master is necessary, Plaintiffs request issuance of an order pursuant to Rule 53.

**1. The issues before the Court are narrow and do not require Special Master involvement.**

Although a Special Master may have been appropriate at earlier stages in this decades-long case, the current status does not require a Special Master because the issues are narrow and discovery is nearly concluded. This thirty year-old case previously involved the liability of not just several companies, but approximately 150 local governments, *see* Local Governments Consent Decree, Aug. 19, 1999 (ECF No. 1671); complex issues involving natural resources damages due to ocean dumping and the release of DDT on land that made its way to the ocean, *see* Off-Shore Consent Decree, Mar. 15, 2001 (ECF No. 2645); and a discovery period lasting nearly ten years. A Special Master has served in this case since 1993,<sup>1</sup> and

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<sup>1</sup> The first reference to a Special Master on the docket is on December 3, 1993. *See* Minute Order re Oral Argument, Dec. 3, 1993 (ECF No. 846).

1 the parties have paid Special Masters and their staff more than \$986,797.<sup>2</sup> Judge  
2 Real appointed Special Master John Francis Carroll discovery referee and  
3 settlement referee on February 14, 2000, and as Special Master on March 6, 2000.  
4 ECF Nos. 1762, 1766. Those appointments were made in the thick of litigation, at  
5 the end of the ten-year discovery period, and during the run-up to trial over  
6 Defendants' liability for response costs incurred and to be incurred at the Montrose  
7 Plant Property, Stauffer Property, the neighborhood area, the current stormwater  
8 pathway, parts of the historic stormwater pathway, and the Palos Verdes Shelf, and  
9 for natural resources damages to various species of fish and birds harmed off the  
10 coast of California. That appointment was also made before amendment of Rule  
11 53 in 2003, which "revised extensively" the existing rule and made clear that  
12 appointment of a Special Master "must be the exception and not the rule." Fed. R.  
13 Civ. P. 53 advisory committee's note – 2003 Amendment.

14 Now, however, each of those issues have settled or have been adjudicated,  
15 and only two issues remain, one of which has been briefed and submitted. *See*  
16 Joint Status Report, Feb. 20, 2020, at 3:14-17 (ECF No. 2932); Joint Status Report,  
17 Mar. 13, 2020, Section IV (ECF No. 2962). As to the remaining issue—the four  
18 remaining Defendants' liability for response costs incurred or to be incurred at a  
19 portion of the Historic Stormwater Pathway—all but one element of CERCLA  
20 liability has been established. Joint Status Report, Aug. 30, 2019, at 2:14-16 (ECF  
21 No. 2841); Joint Status Report, Mar. 13, 2020, at 7:1-9 (ECF No. 2962).

22 This case has also progressed to a stage in which Special Master  
23 involvement would be naturally limited because discovery, and the disputes that  
24 can arise during it, has nearly concluded. Fact discovery closed on February 28,  
25 2020 expert reports and rebuttal reports have been exchanged, and the Parties have  
26 agreed that production of all documents relied on by experts has concluded and no

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27 <sup>2</sup> The following orders disbursed money to the Special Master and his staff: ECF  
28 Nos. 855, 882, 929, 979, 1046, 1065, 1088, 1095, 1097, 1117, 1127, 1240, 1473,  
1478, 1702, 2633, 2656, 2671, 2694, 2738, 2769, 2786, 2803, and 2814.

1 party will further supplement its expert reports. *See* Joint Stipulation to Extend  
2 Deadlines, May 11, 2020, at 3:15-19; 4:11-13 (ECF No. 2977). Based on the  
3 parties' experience taking a dozen fact depositions, Plaintiffs do not anticipate any  
4 issues requiring Special Master involvement to arise during expert depositions.

5         Given these circumstances, and the considerable expense to the parties (and  
6 taxpayers) of a Special Master, the Plaintiffs respectfully submit that a Special  
7 Master is not necessary at this juncture. Delegation to a Special Master should be  
8 sparing in cases such as this one, which involves important public interests. Fed.  
9 R. Civ. P. 53 advisory committee's note – 2003 Amendment ("Direct judicial  
10 performance of judicial functions may be particularly important in cases that  
11 involve important public issues or many parties. At the extreme, a broad delegation  
12 of pretrial responsibility as well as a delegation of trial responsibilities can run  
13 afoul of Article III.").

14         Should the Court disagree with Plaintiffs' position and conclude that a  
15 Special Master is necessary, Plaintiffs, in the alternative, submit that Special  
16 Master Smith act as settlement master over Defendants' liability for costs incurred  
17 or to be incurred at the Historic Stormwater Pathway in response to the release of  
18 hazardous substances from the Montrose DDT Plant. Plaintiffs note, however,  
19 that the recent proposed settlement reached by the parties regarding the operation  
20 and maintenance of the groundwater remedy demonstrates that the parties are  
21 capable of negotiating resolution on their own.

22                 **2.** Defendants' proposal to provide the Special Master broad  
23 authority, including all powers in the Federal Rules of Civil  
24 Procedure, is inappropriate.

25         As reported in the March 13, 2020 Joint Status Report, Defendants propose  
26 providing the Special Master "all powers set forth in the Federal Rules of Civil  
27 Procedure." ECF No. 1962; *see* Order Appointing Special Master, Mar. 18, 2000  
28 (ECF No. 1766) (providing Special Master Carroll all powers set forth in the

1 Federal Rules of Civil Procedure). Such an extraordinary grant of authority is not  
2 necessary or appropriate here, and Plaintiffs do not consent to such an order. The  
3 straightforward and narrow issues described above do not present any exceptional  
4 condition or complex accounting to be performed that justifies a Special Master  
5 pursuant to Rule 53(a)(1)(B). *See La Buy v. Howes Leather Co.*, 352 U.S. 249,  
6 259 (1957); *Burlington Northern R. Co. v. Dep't of Revenue of State of Wash.*, 934  
7 F.2d 1064, 1072 (9<sup>th</sup> Cir. 1991) (citing the Supreme Court's decision in *La Buy* that  
8 "calendar congestion, case complexity, and anticipation of a lengthy trial" did not  
9 constitute an exceptional condition justifying wholesale reference of a case to the  
10 Special Master).

11 Defendants suggest that a Special Master is necessary due to the COVID-19  
12 pandemic, but Plaintiffs are not aware that a district judge or magistrate judge is  
13 unavailable to effectively and timely address pretrial and post-trial matters. *See*  
14 Fed. R. Civ. P. 53(a)(1)(C). Plaintiffs appreciate that the Central District of  
15 California implemented its Continuity of Operations Plan and took other measures  
16 to slow the spread of the virus while nevertheless continuing its critical operations.  
17 The Parties have demonstrated that they are able to resolve discovery issues  
18 themselves, and have also been respectful of the Court's time, bringing only two  
19 discovery disputes to Magistrate Judge Standish, who quickly and efficiently  
20 resolved the issues without causing the Parties (and taxpayers) to incur the expense  
21 of a Special Master. Minutes of Pre-Discovery Motion, Feb. 3, 2020 (ECF No.  
22 2914); Amended Minutes regarding Plaintiff's Motion to Compel, Mar. 13, 2020  
23 (ECF No. 2961).<sup>3</sup>

24  
25  
26 <sup>3</sup> Plaintiffs also note that because there are public entities, they are subject to  
27 restrictions or legal prohibitions on paying retainers for services not yet received,  
28 such as the deposit required by JAMS for Special Master Smith. *See, e.g.*,  
California Constitution Article XVI, §§ 3 and 6; 48 C.F.R. § 32.402. Plaintiffs  
also require an order by the Court for every payment of public funds to be made  
for services actually rendered by a Special Master.



1                   **3.**     Negotiations regarding Defendants' responsibility to remediate  
2                   various portions of the Montrose Superfund Site are not before  
3                   the Court.

4                   As set forth in Section V.A.2. of the March 13, 2020 Joint Status Report,  
5     Plaintiffs respectfully reiterate that the negotiations between the Parties regarding  
6     Defendants' responsibility to remediate the various parts of the Montrose  
7     Superfund Site for which they have already been found liable are not before the  
8     Court, and the Plaintiffs do not consent to appointment of a Special Master to  
9     oversee those negotiations. In earlier phases of this litigation, Plaintiffs secured  
10    liability determinations and declaratory judgment against Defendants, binding in  
11    all subsequent actions, for all further response costs regarding the Stauffer Property  
12    (where the Montrose DDT Plant is located). Orders Granting Plaintiffs' Summary  
13    Judgments, ECF Nos. 1922, 2445; *see* 42. U.S.C. § 9613(g)(2) (in a cost recovery  
14    case under section 107 of CERCLA, "the court shall enter a declaratory judgment  
15    on liability for response costs or damages that will be binding on any subsequent  
16    action or actions to recover further response costs or damages").

17                  Plaintiffs have not brought a subsequent action pursuant to the declaratory  
18    judgment to recover further response costs incurred in performing the groundwater,  
19    soils, or DNAPL remedies. Further, the agreement in principle recently reached by  
20    the Parties resolves Defendants' obligation to perform remedial action at the  
21    groundwater operable unit and pay response costs for groundwater. Should the  
22    Parties be unable to negotiate settlements for the Defendants to carry out the  
23    DNAPL or soil remedies, Plaintiffs may incur further response costs in performing  
24    those remedies themselves, and may bring a subsequent action pursuant to the  
25    declaratory judgment to recover those costs. Until that time, however, Plaintiffs  
26    respectfully submit that there are no claims regarding soil, groundwater, or  
27    DNAPL cost recovery or remedies before the Court for consideration or resolution,  
28    and no disputes to be decided.



1 Congress, in CERCLA, conferred the remedy selection and implementation  
2 process to the President, who has delegated that authority to the Environmental  
3 Protection Agency. 42 U.S.C. §§ 9604 (giving the President authority to select  
4 remedial actions), 9613(h) (“No Federal court shall have jurisdiction under Federal  
5 law . . . to review any challenges to removal or remedial action selected under  
6 section 9604 of this title, or to review any order issued under section 9606(a) of  
7 this title, except” for a claim under 42 U.S.C. §§ 9606, 9606(a), or 9607(a) or other  
8 situations not applicable here.). Defendants request that the Court and Special  
9 Master intervene in EPA’s selection of a DNAPL remedy, but cases routinely  
10 reject this kind of involvement in EPA’s remedy selection process. *See Cooper*  
11 *Indus., Inc. v. U.S. E.P.A.*, 775 F. Supp. 1027, 1037–38 (W.D. Mich. 1991) (“[T]he  
12 ban on preimplementation review extends not only to parties’ contentions that the  
13 remedy selected does not meet the substantive requirements of CERCLA, but also  
14 to procedural claims regarding the EPA’s remedy selection process.”) (citing  
15 *Schalk v. Reilly*, 900 F.2d 1091, 1097 (7th Cir.), *cert. denied*, 498 U.S. 981, 111  
16 S.Ct. 509, 112 L.Ed.2d 521 (1990)). Even efforts seeking a speedier response  
17 action improperly impact the government’s remedial action and are therefore  
18 barred. *Hanford Downwinders Coal., Inc. v. Dowdle*, 841 F. Supp. 1050, 1061  
19 (E.D. Wash. 1993), *aff’d*, 71 F.3d 1469 (9th Cir. 1995), and *aff’d sub nom.*  
20 *Columbia River United v. Dowdle*, 76 F.3d 385 (9th Cir. 1996). As such,  
21 involvement of a Special Master in negotiations regarding remediation of the  
22 DNAPL, soils, or groundwater at and near the Stauffer Property is not appropriate  
23 and would be inconsistent with the jurisdiction conferred by CERCLA.

#### 24 **B. Defendants’ Position**

25 Defendants disagree with the sharply circumscribed role that the government  
26 plaintiffs envision for Special Master Smith. The government plaintiffs’ approach  
27 would (i) prohibit Special Master Smith from communicating *ex parte* without  
28 written consent of each Party; (ii) prevent Special Master Smith from

1 communicating to the Court the specifics of any party's settlement position without  
2 the consent of the other party; and (iii) limit the Special Master solely to  
3 conducting settlement conferences regarding Defendants' liability for Plaintiffs'  
4 response costs to the historic stormwater pathway south of Torrance Boulevard.  
5 Plaintiffs would thus seek to prevent Special Master Smith from being involved in  
6 settlement discussions for other disputes between the parties. For example,  
7 Defendants would like to proceed with full-scale remediation of DNAPL at the  
8 site, but EPA has yet to issue the Record of Decision, despite issuing a Proposed  
9 Plan for the remedy six years ago. Special Master Smith could assist the parties in  
10 resolving that dispute, leading to a Consent Decree to implement the DNAPL  
11 remedy.

12 The government's position also conflicts with the directions the Court  
13 provided at the February 21, 2020 status conference when it first appointed Special  
14 Master Smith. At that hearing, the Court indicated that Special Master Smith  
15 would be involved in discovery, ensuring compliance with consent decrees, and  
16 that he would be present at status conferences, which suggests a much broader role  
17 than that which the government envisions. Feb. 20, 2020 Status Conference  
18 Transcript, Vol. 3, 7:25-8:2; 35:6-36:1; Vol. 1, 35:2-18.

19 The Defendants agree with the Court and respectfully suggest that the Court  
20 enter an order along the lines of the order Judge Real issued when he appointed  
21 Special Master Smith's predecessor, Special Master John Francis Carroll, which  
22 provides broader authority than the government is suggesting in its proposed order.  
23 *See* Ex. 1, 3/6/2000 Order Appointing Special Master. With Special Master  
24 Carroll's involvement, the parties were able to successfully resolve liability with  
25 respect to the vast majority of the site through the entry of numerous separate  
26 Consent Decrees and resolve a major litigation. The Defendants found Special  
27 Master Carroll's assistance to be very useful and believe that Judge Smith could  
28 similarly assist the parties and the Court, as needed. Further, the Defendants

1 believe it is especially important now that the Special Master be afforded the  
2 latitude to participate in all issues between the parties since the Court will  
3 undoubtedly have a backlog of matters to resolve as a result of reduced Court  
4 operations for the last two-plus months due to COVID-19.

5 **III. CONCLUSION**

6 The Parties appreciate the Court's time and attention to this matter.

7  
8 Respectfully submitted,

9 Dated: June 3, 2020

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12 John T. Ryan  
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15 Dated: June 3, 2020

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19 **ATTESTATION**

20 I hereby attest that all other signatories listed, and on whose behalf this filing  
21 is submitted, concur in the filing's content and have authorized this filing.

22 Dated: June 3, 2020

23 / s / John T. Ryan  
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